

BILL NO. BL2018-1189 (S. DAVIS & HURT) – This ordinance would amend the Procurement Non-Discrimination Program (the Program) in Chapter 4.46 of the Procurement Code.

Under the current Metro Code of Laws Sec. 4.46.080, Bidders for Metro contracts are required to make certain “good faith efforts” in the procurement process, such as include Minority and Women Owned Business Enterprises (MWBEs) in the procurement process, not discriminate or deny opportunities based on race, ethnicity or gender, and keep records of solicitations, advertisements, and other relevant papers required by the Non-Discrimination Program or Sec. 4.12.180. Bidders are also required to demonstrate these good faith efforts by actions such as attending informational meetings to update vendors or subcontractors on opportunities, dividing contracts into segments that could be performed by a MWBE, providing a non-discriminatory work site, soliciting specific individual MWBEs, and providing reasonable assistance to MWBEs in need of equipment, supplies, bonding, letters of credit and/or insurance, among other actions.

This ordinance proposes a new Sec. 4.46.080, which would require evidence of good faith, including a detailed description of techniques used to obtain the maximum participation of MWBEs. This includes the following:

- Segmenting the totality of the work into two or more smaller portions where feasible and can be accomplished in accordance with common and accepted industry practices relating to the utilization of sub-contractors;
- Attending pre-solicitation, pre-bid and other conferences and forums that allow interested minority and women owned firms to market their goods and services;
- Sending letters/emails and other direct communication to minority and women owned firms;
- Advertising in publications in general circulation, as well as those directed to specific trades or marketed to small businesses, and those owned by racial minorities and women;
- Providing reasonable assistance with bonding, insurance and technical matters;
- Cooperating with Metro Government in administration and monitoring of compliance with its non-discrimination policies;
- Allowing minority sub-contractors to participate in any upgrade, change order or contract extension associated with the original sub-contracting agreement;
- Reaching out only to firms that have expertise in the business segment that is required for the bid;
- Paying sub-contractors within net 15 -30 days of work completed; and
- Good Faith effort contacts shall be made at least 10 business days prior to the bid closing.

Current Metro Code of Laws Sec. 4.46.100 contains sanctions and penalties for non-compliance with the Program. The Office of Minority and Women Business Assistance (BAO) recommends appropriate mechanisms to enforce the Program to the Purchasing Agent. Failure of a Bidder or Participant to comply with the Program can be grounds for suspension or debarment by the Purchasing Agent. The Purchasing Agent is directed to consider certain factors when determining appropriate sanctions for a Bidder or Participant.

The proposed new Sec. 4.46.100 would move enforcement of the Program to the BAO and require that adequate staff be provided to perform the functions of the BAO. Failure of a Bidder or Participant to comply with the Program would subject the party to sanction, such as cancellation of the contract, rejection of future bids, and debarment. The BAO would be authorized to reject any bid without MWBE participation, unless the Bidder could provide evidence of non-availability of a MWBE within the Nashville MSA. The BAO and/or the Purchasing Agent would be required to contact each MWBE identified on the Bidder's submission to ensure the MWBE contractor has experience in the appropriate subject matter or industry and has engaged in a good faith discussion with the Bidder. Finally, Purchasing would be required to allow MWBEs use of third party financing vehicles, such as joint/shared purchase orders for the contract awarded or project undertaken.

It should be noted that the Metro Legal Department has expressed concerns that this ordinance may contain unconstitutional race and gender based preferences and is inconsistent with the current framework of the Procurement Non-Discrimination Program. Second reading was previously deferred by the sponsor, and an amendment is recommended to address multiple concerns. Additionally, the Metropolitan Government is awaiting the results of a disparity study by Griffin & Strong, P.C., previously commissioned to examine the procurement practices of the Metropolitan Government. That study is expected to be completed within the next thirty (30) days.

It is anticipated that the sponsor will indefinitely defer this ordinance.

Fiscal Note: The Office of Minority and Women Business Assistance (BAO) presently has a full-time staff of six employees within the Finance Department Procurement Division. If this ordinance is approved, the Finance Department does not believe it would be possible for the current BAO to administer the new provisions with their current staffing and operational budget. Although they believe an increase would be required, the amount has not yet been determined.